Supreme Court, U.S.
FILED
JUN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1570 (2)

# In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS H. HAJECATE AND DOROTHY A. HAJECATE,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
*Solicitor General*

SHIRLEY D. PETERSON
*Assistant Attorney General*

GARY R. ALLEN
CHARLES E. BROOKHART
WILLIAM A. WHITTLEDGE
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

BEST AVAILABLE COPY

## QUESTION PRESENTED

Whether this Court's decisions in *United States* v. *Baggot*, 463 U.S. 476 (1983), and *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), should be applied to prohibit the use of grand jury materials authorized by the district court's 1979 and 1981 orders and previously disclosed to the IRS pursuant to those orders.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 4 |
| Conclusion | 9 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940) | 5, 8 |
| *Disclosure of Grand Jury Material (Basic Earth Science Systems, Inc.), In re*, 821 F.2d 1290 (7th Cir. 1987) | 3, 6, 8 |
| *Dugan* v. *United States*, 110 S. Ct. 839 (1990) | 4 |
| *Gluck* v. *United States*, 771 F.2d 750 (3d Cir. 1985) | 6 |
| *Graham* v. *Commissioner*, 770 F.2d 381 (3d Cir. 1985) | 8 |
| *Grand Jury Investigation (Sells), In re*, 719 F.2d 985 (9th Cir. 1983) | 7 |
| *Grand Jury Proceedings (Henry Kluger, Deceased) In re*, 827 F.2d 868 (2d Cir. 1987) | 8 |
| *Grand Jury Proceedings "Operation Gateway" In re*, 877 F.2d 632 (7th Cir. 1989), cert. denied *sub nom. Dugan* v. *United States*, 110 S. Ct. 839 (1990) | 3, 6 |
| *Hajecate* v. *Commissioner*, 90 T.C. 280 (1988) | 2, 3 |
| *Raven's Hollow, Ltd.* v. *United States*, 481 U.S. 1032 (1987) | 4 |
| *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961) | 5, 6, 7 |
| *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969) | 7 |
| *United States* v. *Baggot*, 463 U.S. 476 (1983) | 2, 4 |

Cases – Continued: Page

*United States* v. *Leon*, 468 U.S. 897 (1984) .... 6
*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) ..... 2, 4, 6
*United States* v. *Sutton*, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), cert. denied, 479 U.S. 1030 (1987) ..... 8-9
*United States* v. *Swift & Co.*, 286 U.S. 106 (1932) ..... 5
*United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) ..... 7-8
*United States* v. *(Under Seal)*, 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987) .... 6

Statute and rule:

18 U.S.C. 1001 ..... 2
Fed. R. Crim. P. 6(e) ..... 2, 3, 4, 5, 6, 7, 8, 9

# In the Supreme Court of the United States

OCTOBER TERM, 1989

---

No. 89-1570

THOMAS H. HAJECATE AND DOROTHY A. HAJECATE,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 889 F.2d 1466. The order of the district court (Pet. App. 12a-13a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on December 14, 1989. A petition for rehearing was denied on January 8, 1990 (Pet. App. 7a). The petition for a writ of certiorari was filed on April 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Following a series of federal grand jury investigations in 1978 and 1979 into petroleum pricing practices, peti-

tioner Thomas Hajecate was indicted on various violations of federal law, including price fixing, tax evasion, and RICO violations. He subsequently pleaded guilty to a superseding information charging him with violating 18 U.S.C. 1001. Petitioner Thomas Hajecate's counsel in the criminal case was given unlimited access to the grand jury materials (see Sept. 2, 1988 Tr. (Pt. 2), at 8). Pet. App. 2a-3a; Pet. 4.

In 1979, and again in 1981, the United States District Court for the Southern District of Texas, pursuant to *ex parte* government motions, entered orders under Fed. R. Crim. P. 6(e) authorizing disclosure of matters occurring before those grand juries to the Internal Revenue Service for use in determining petitioners' correct tax liability for the years 1976 through 1978. The documents disclosed to the IRS under the terms of those orders formed the basis of statutory notices of deficiency in income tax for 1976-1978 that were issued to petitioners by the IRS in October 1980, 1981, and 1982. Petitioners timely filed petitions with the Tax Court to challenge those deficiencies. See Pet. App. 3a; *Hajecate* v. *Commissioner*, 90 T.C. 280, 283-284 (1988).

2. On June 30, 1983, while the petitions were pending in the Tax Court, this Court held that the provisions of Rule 6(e) require the government to make a showing of particularized need in order to obtain disclosure of matters occurring before a grand jury (*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418) and do not otherwise allow disclosure of matters occurring before a grand jury for use in an investigation to determine civil tax liability (*United States* v. *Baggot*, 463 U.S. 476). Subsequently, petitioner filed a motion in the Tax Court to determine the IRS's right to use the grand jury material, arguing that *Baggot* and *Sells* should be given retroactive application to invalidate the Rule 6(e) order under which the IRS had obtained the grand jury materials. See Pet. 5; *Hajecate* v. *Commissioner*, 90 T.C. at 281-282.

The Tax Court granted petitioners' motion in part. *Hajecate* v. *Commissioner*, *supra*. The Tax Court held that *Baggot* and *Sells* should be given "prospective" effect to preclude the government from further using the materials obtained under the original disclosure orders until the government obtained a new Rule 6(e) order from the district court by satisfying the standard of "particularized need" required by *Sells* (90 T.C. at 292; see Pet. App. 3a). Accordingly, the Tax Court entered an order that prevented the government from further disclosure or use of the material to which it was originally given access under the terms of the 1979 and 1981 Rule 6(e) orders, and upon which it had based its deficiency claims (Pet. App. 3a).

3. Relying on the prior Rule 6(e) orders, the government thereafter made a new *ex parte* application to the United States District Court for the Southern District of Texas seeking access to the same materials obtained under the prior orders. The government also contended that it had a "particularized need" for the documents in order to continue its case against petitioners in the Tax Court. See Pet. App. 3a-4a. The district court entered an order authorizing production and the continued use of the grand jury materials in the Tax Court proceedings (except for transcripts of testimony by witnesses), and the district court subsequently denied petitioner's motion to vacate that order (Pet. App. 8a-9a, 12a-13a; see also *id.* at 4a).

4. The court of appeals affirmed the district court's order (Pet. App. 1a-6a). Expressly agreeing with the Seventh Circuit's decisions in *In re Grand Jury Proceedings "Operation Gateway" (Dugan II)*, 877 F.2d 632 (1989), cert. denied *sub nom. Dugan* v. *United States*, 110 S. Ct. 839 (1990), and *In re Disclosure of Grand Jury Material (Basic Earth Science Systems, Inc.)*, 821 F.2d 1290 (1987), the court of appeals held that the 1979 and 1981 Rule 6(e) orders were final judgments of the district court that remained binding

unless modified, regardless of the change in the law occasioned by *Baggot* and *Sells*. Pet. App. 5a-6a. The court of appeals therefore concluded that there was no basis for reversal even though the district court had not based its new order on satisfaction of a standard of particularized need. Rather, the court observed that the district court had chosen not to modify or vacate the orders in light of *Sells*, but had "simply re-affirmed the validity of the earlier production orders"; the court of appeals explained that this was permissible because the prior orders were "final, unappealed judgments of the district court" that "remained binding 'regardless of any change in the law.' " *Id.* at 5a.

## ARGUMENT

Petitioner contends that this Court should grant certiorari to consider the effect of its decisions in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), and *United States* v. *Baggot*, 463 U.S. 476 (1983), on outstanding Rule 6(e) orders issued before the date of those decisions. This issue plainly does not warrant review by this Court. There is no conflict in the circuits on this question, and the court of appeals correctly rejected petitioners' contention. Moreover, the significance of the issue presented by petitioners is continually diminishing with the passage of time because it applies only to Rule 6(e) orders entered before June 30, 1983. This Court has already declined to consider this issue on two occasions, including in the case heavily relied upon by the court below (see *Dugan* v. *United States*, 110 S. Ct. 839 (1990); *Raven's Hollow, Ltd.* v. *United States*, 481 U.S. 1032 (1987)), and there is no more reason to grant certiorari here.

1. There is no merit to petitioners' contention that *Baggot* and *Sells* should be applied to prevent the use after June 30, 1983, of grand jury materials obtained under pre-existing Rule 6(e) orders. *Baggot* and *Sells* announced standards

that a court must follow in authorizing, in the first instance, disclosure of grand jury materials under Rule 6(e); those cases did not purport to prohibit future use of grand jury materials obtained under the authority of Rule 6(e) orders that had previously been entered under a lesser standard or to invalidate all such outstanding orders. It is well established that a final order in a civil case cannot be retrospectively challenged on the basis of a subsequent decision. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940).[1] There is similarly no reason to vacate a Rule 6(e) order that was properly issued under then-prevailing standards and subsequently relied on in determining the tax deficiencies under dispute in the Tax Court proceeding when there has been no showing (and none was made here) that a failure to vacate the order would be inequitable. See, *e.g.*, *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961); *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932).[2] Accordingly, petitioners' conten-

---

[1] Contrary to petitioners' contention (Pet. 12-15), the fact that the original Rule 6(e) orders were issued in an *ex parte* proceeding does not mean that they were not "final" before *Sells* and *Baggot* were decided. The courts below recognized (see Pet. App. 5a) that those orders authorized the use of the grand jury materials in the Tax Court proceeding involved here. Thus, unless there is some reason for modifying or vacating those orders, they continue to permit the authorized uses. As discussed *infra*, and as the courts below held (*ibid.*), the decision in *Sells* did not require that existing orders be modified or vacated.

[2] *Wright* makes clear that valid court orders need not be vacated or modified to account for a change in the law that would have precluded their issuance as an original matter. The Court stated in *Wright* that "[a] balance must be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances" (364 U.S. at 647-648) and that because there is "such a balance of imponderables there must be wide discretion in the District Court" (*id.* at 648). Modification is required only "when a change in law or facts has made inequitable what was once equitable"

tion has consistently been rejected by the courts of appeals. See *Dugan II*, *supra*; *In re Basic Earth Science Systems, Inc.*, *supra*; *United States* v. *(Under Seal)*, 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987); *Gluck* v. *United States*, 771 F.2d 750 (3d Cir. 1985) (grand jury materials obtained under a facially valid pre-*Baggot* and *Sells* Rule 6(e) order are not suppressible even under the assumption that *Baggot* and *Sells* should be applied retroactively).

Vacating the Rule 6(e) orders entered in this case would not vindicate the public policies underlying *Baggot* and *Sells* and is not necessary to eliminate any actual unfairness to petitioners. The materials in question were disclosed to the IRS pursuant to a disclosure order that petitioners concede was valid when entered. There is thus no suggestion of improper government conduct that needs to be remedied. See *Gluck* v. *United States*, 771 F.2d at 757-758 (upholding IRS summons issued in good-faith reliance on a pre-*Baggot* Rule 6(e) disclosure order); cf. *United States* v. *Leon*, 468 U.S. 897 (1984). To the contrary, the effect of vacating the order here would be further to delay and complicate tax proceedings prepared in good faith and commenced more than eight years ago. Moreover, prohibiting the future use of materials disclosed under pre-1983 Rule 6(e) orders is obviously not necessary to protect the public policies underlying the decision in *Sells* – enhancing the willingness of grand jury witnesses to come forward and testify fully and candidly, and preventing the improper use of the grand jury for civil discovery purposes. See *Sells*, 463 U.S. at 432-433. Those interests are safeguarded by applying the standards adopted in *Baggot* and *Sells* to future disclosure applications.

---

(*id.* at 652). Petitioners do not explain why it would be inequitable to allow the IRS to continue to use the grand jury materials in accordance with the original Rule 6(e) orders; to the contrary, it would be inequitable to prohibit such use.

On the other hand, petitioners' proposed application of *Baggot* and *Sells* could significantly prejudice the government's opportunity to complete the ongoing civil and administrative proceedings. The government reasonably relied on these materials in preparing for and developing those proceedings. Vacating the Rule 6(e) order would, at a minimum, force the government to engage in the burdensome process of attempting to reacquire these materials through civil discovery or under the IRS's subpoena power. At worst, the government could be denied the opportunity to obtain these materials at all, either because they are no longer available (see Pet. App. 3a) or on the ground that the IRS's efforts to reacquire these materials are "tainted" by the knowledge it obtained from its current use of them. Petitioners have offered no reason why they should be allowed to obtain an inequitable litigating advantage in that fashion—to the detriment of a just resolution of the merits of the tax controversy. In sum, in these circumstances it would be a decision to revoke the pre-1983 Rule 6(e) orders, not the continued effectiveness of those orders, that would serve as "an instrument of wrong" (*System Federation No. 91* v. *Wright*, 364 U.S. at 647).

2. Contrary to petitioners' contention (Pet. 16-17), the decision below does not conflict with any decision of another court of appeals. *In re Grand Jury Investigations (Sells)*, 719 F.2d 985 (9th Cir. 1983), in contrast to this case, involved a direct appeal from a Rule 6(e) order entered before *Baggot* was decided. Following the rule that an appellate court should apply existing law (see, *e.g.*, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-283 (1969)), the court of appeals held that the Rule 6(e) order must be reversed on the authority of *Baggot*. But the Ninth Circuit's decision in *Sells*, like this Court's decisions in *Thorpe* and *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110

(1801), has no bearing on petitioners' contentions here. When a case is pending on direct review at the time the controlling law changes, *Schooner Peggy* holds that the appellate court ordinarily applies the law as it exists, *i.e.*, in light of the recent change. That principle, however, does not apply to orders that have already become final, and thus are before the court only by virtue of an attempt to modify or vacate such orders because of the change in the law. See *Chicot County Drainage District* v. *Baxter State Bank*, *supra*; *In re Basic Earth Science Systems, Inc.*, 821 F.2d at 1293.

Similarly, there is no conflict between the decision below and the Second Circuit's decision in *In re Grand Jury Proceedings (Henry Kluger, Deceased)*, 827 F.2d 868 (2d Cir. 1987). In *Kluger*, the district court had modified a pre-*Baggot* Rule 6(e) order to condition further disclosures on a showing of particularized need. The court of appeals emphasized that this modification was an exercise of the district court's discretion and therefore the scope of appellate review was "narrow" (827 F.2d at 874). The court of appeals upheld the modification, explaining that it was "unable to conclude that" the district judge had "transgressed the limits of his discretion" (*ibid.*). Clearly, that decision does not stand for the proposition that every pre-1983 Rule 6(e) order must be vacated unless the government makes a showing of particularized need. Accordingly, it does not conflict with the decision below, which did not deny that the district court could have determined to modify the orders in light of *Baggot* and *Sells*.[3]

---

[3] In *Graham* v. *Commissioner*, 770 F.2d 381 (1985), the Third Circuit held that even retroactive application of *Baggot* and *Sells* would not provide grounds for the Tax Court to suppress grand jury materials obtained by the IRS prior to 1983 in good faith reliance on a Rule 6(e) order. *United States* v. *Sutton*, 795 F.2d 1040 (Temp. Emer. Ct.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
*Solicitor General*
SHIRLEY D. PETERSON
*Assistant Attorney General*
GARY R. ALLEN
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
*Attorneys*

JUNE 1990

---

App. 1986), cert. denied, 479 U.S. 1030 (1987), did not involve the "particularized need" standard at all, but rather the question whether certain materials were protected by Rule 6(e). The court of appeals did not vacate the district court's order; it upheld the district court's determination that certain material was protected by Rule 6(e), noting that the ruling was based on existing law. See 795 F.2d at 1051.

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203:00942